

PUBLIC LIBRARIES, LIMITED FORUMS: CRITIQUING THE FIFTH CIRCUIT’S DECISION IN *LITTLE* v. *LLANO COUNTY*

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Conflicts over the collections of public libraries have become increasingly frequent in the twenty-first century. In 2025, the Fifth Circuit held that library collections are government speech, thereby preventing patrons from challenging book removals. This Note critiques that decision and analyzes which First Amendment doctrine should govern the curation decisions of a public library. It examines the historical evolution of the public library and First Amendment doctrine to argue for classification of the public library’s collection as a limited public forum. This classification allows libraries to make reasonable, viewpoint-neutral decisions about retaining books in their collections while ensuring that viewpoint discrimination does not threaten patrons’ rights to receive information.

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INTRODUCTION

“The three most important documents a free society gives are a birth certificate, a passport and a library card.”¹ Andrew Carnegie wrote in his essay *The Gospel of Wealth* that a free library is “the best gift which can be given to a community . . . provided the community will accept and maintain it as a public institution.”² This conviction led him to donate funds to establish 1,681 libraries across the United States.³ Although Carnegie’s large contributions to libraries are unique, his dedication to the public library as an ideal is not.⁴ For example, Leila Green Little’s “lifelong love of libraries and reading” led her to volunteer at the Llano County Public Library in Texas and join the library’s board.⁵ She eventually sued the library and Llano County for violating her First Amendment right—seventeen books were

1. Herbert Hadad, *Helping a Library Celebrate*, N.Y. TIMES, Mar. 27, 1994, at WC20 (quoting E.L. Doctorow).

2. ANDREW CARNEGIE, *THE GOSPEL OF WEALTH* 24 (Carnegie Corp. of New York 2017) (1889).

3. *Andrew Carnegie’s Library Legacy: A Timeline*, CARNEGIE CORP. OF N.Y. (Jan. 8, 2025), <https://www.carnegie.org/our-work/article/andrew-carnegies-library-legacy/> (on file with the *Fordham Law Review*).

4. See *id.*; see also Ileana Garnand, *Meet the Texan Who Sued to Keep Books in Libraries Her Family Visited for Generations*, LONE STAR LIVE (Apr. 1, 2024), <https://www.lonestarlive.com/news/2024/04/meet-the-texan-who-sued-to-keep-books-in-libraries-her-family-visited-for-generations.html> [<https://perma.cc/K8PY-ERYJ>].

5. See Garnand, *supra* note 4.

removed from circulation based on what Little and her coplaintiffs claimed were political objections to the books' contents.⁶ The U.S. District Court for the Western District of Texas and the U.S. Court of Appeals for the Fifth Circuit agreed with Little,⁷ ordering a preliminary injunction.⁸ However, the Fifth Circuit granted a rehearing en banc⁹ and reversed, holding that the "plaintiffs cannot invoke a right to receive information to challenge a library's removal of books" and that "a library's collection decisions are government speech and therefore not subject to Free Speech challenge."¹⁰

Despite a deep body of case law on curation decisions for school libraries, *Little v. Llano County*¹¹ represents the first time an appellate court considered whether a public library's content-based curation of books is government speech and is thereby immune from challenges on First Amendment grounds.¹² In doing so, the Fifth Circuit held that patrons have no first amendment right to receive information, and a plurality held that library curation is government speech, disagreeing with both its previous decision in *Campbell v. St. Tammany Parish School Board*¹³ and the U.S. Court of Appeals for the Eighth Circuit's decision in *GLBT Youth in Iowa Schools Task Force v. Reynolds*.¹⁴ This disagreement stems from conflicting interpretations of the Free Speech Clause of the First Amendment and the U.S. Supreme Court's plurality opinion in *Board of Education v. Pico*.¹⁵ Although the Supreme Court has denied the plaintiff's petition for a writ of

6. See Brief of Plaintiffs-Appellees at 5–11, *Little v. Llano Cnty.*, 138 F.4th 834 (5th Cir. 2025) (en banc) (No. 23-50224), 2023 WL 3791773. The removed books were *In the Night Kitchen* by Maurice Sendak, *It's Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie H. Harris and Michael Emberley, *Caste: The Origins of Our Discontents* by Isabel Wilkerson, *They Called Themselves the K.K.K.: the Birth of an American Terrorist Group* by Susan Campbell Bartoletti, *Being Jazz: My Life as a (Transgender) Teen* by Jazz Jennings, *Freakboy* by Kristin Elizabeth Clark, *Shine* by Lauren Myracle, *Gabi, a Girl in Pieces* by Isabel Quintero, *Spinning* by Tillie Walden, *Under the Moon: a Catwoman Tale* by Lauren Myracle and Isaac Goodhart, and two children's book series: *My Butt Is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!*, all by Dawn McMillan and Ross Kinnaird, and *Larry the Farting Leprechaun*, *Gary the Goose and His Gas on the Loose*, *Freddie the Farting Snowman*, and *Harvey the Heart Has Too Many Farts*, all by Jane Bexley. *Little v. Llano Cnty.*, 138 F.4th 834, 868 n.2 (5th Cir.) (en banc) (Higginson, J., dissenting), *cert. denied*, 146 S. Ct. 886 (2025).

7. *Little v. Llano Cnty.*, No. 22-CV-424, 2023 WL 2731089, at *1 (W.D. Tex. Mar. 30, 2023), *aff'd as modified*, 103 F.4th 1140 (5th Cir. 2024), *reh'g en banc granted, opinion vacated*, 106 F.4th 426 (5th Cir. 2024), and *rev'd and remanded*, 138 F.4th 834 (5th Cir. 2025) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

8. Garnand, *supra* note 4.

9. *Little v. Llano Cnty.*, 106 F.4th 426, 427 (5th Cir. 2024), *reh'g en banc granted, opinion vacated*, 106 F.4th 426 (5th Cir. 2024), and *rev'd and remanded*, 138 F.4th 834 (5th Cir. 2025) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

10. *Little v. Llano Cnty.*, 138 F.4th 834, 836–37 (5th Cir.) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

11. 138 F.4th 834 (5th Cir. 2025) (en banc).

12. See *infra* Part II.A.

13. 64 F.3d 184 (5th Cir. 1995), *overruled by Little v. Llano Cnty.*, 138 F.4th 834 (5th Cir. 2025) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

14. 114 F.4th 660 (8th Cir. 2024).

15. 457 U.S. 853 (1982).

certiorari in *Little*, the conflict at the heart of the case is likely to arise in other circuits.¹⁶

This Note argues that the Fifth Circuit's approach should be rejected in favor of an understanding of the public library as a limited public forum, which would allow curation but prevent viewpoint discrimination. Part I examines the history of public libraries and related law in the United States, including the development of the public library and related free speech doctrines. It also traces the development of the government speech and public forum doctrines. Part II analyzes the legal status of library curation decisions in court cases from *Pico* to *Little*. Finally, Part III rejects the arguments for classifying library curation as government speech and instead proposes that a library's book collection be considered a limited public forum.

I. THE HISTORY OF LIBRARIES AND SPEECH

In recent years, public libraries have become the site of controversy, particularly over which books are appropriate for which audiences.¹⁷ Similar issues arise in school libraries.¹⁸ Critics of these curation decisions refer to them as “book bans”¹⁹ and accuse opposition groups, library boards, and

16. *Little v. Llano Cnty.*, 146 S. Ct. 886 (2025). Since the Fifth Circuit's en banc decision in *Little*, similar questions have arisen in the district courts in the U.S. Courts of Appeals for the Eleventh and Fourth Circuits. See *Penguin Random House LLC v. Gibson*, 796 F. Supp. 3d 1052, 1069 (M.D. Fla. 2025) (distinguishing *Little*'s holding on government speech); *E.K. ex rel. Keeley v. Dep't of Def. Educ. Activity*, 807 F. Supp. 3d 517, 539 n.6 (E.D. Va. 2025) (finding *Little* unpersuasive); *O.R. ex rel. Rogers v. Greenville Cnty.*, No. 25-CV-02599, 2026 WL 815913, at *8 (D.S.C. Mar. 19, 2026) (comparing the holding of *Little* with *PEN Am. Ctr., Inc. v. Escambia Cty. Sch. Bd.*, 711 F. Supp. 3d 1325, 1331 (N.D. Fla. 2024), and *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660, 667–68 (8th Cir. 2024), and finding the government speech argument unpersuasive). In all three cases, the courts declined to follow *Little*.

17. See John Burnett, *Local Libraries Have Become a Major Political and Cultural Battleground*, NPR (Aug. 31, 2022, at 05:00 ET), <https://www.npr.org/2022/08/31/1119752817/local-libraries-have-become-a-major-political-and-cultural-battleground> [<https://perma.cc/2FUH-4JB3>]; *In the Battle over Books, Who Gets to Decide What's Age-Appropriate at Libraries?*, ALASKA PUB. MEDIA (Nov. 28, 2023, at 10:16 AKT), <https://alaskapublic.org/news/2023-11-28/in-the-battle-over-books-who-gets-to-decide-whats-age-appropriate-at-libraries> [<https://perma.cc/U2CH-NEUM>]; see also Maya C. Miller & Carl Hulse, *Lawmakers in Both Parties Resist Trump's Attempt to Seize Control of Their Library*, N.Y. TIMES (May 15, 2025), <https://www.nytimes.com/2025/05/15/us/politics/library-of-congress-trump.html> (on file with the *Fordham Law Review*); Jennifer Schuessler, *American Library Association Sues to Stop Trump Cuts*, N.Y. TIMES (Apr. 8, 2025), <https://www.nytimes.com/2025/04/08/arts/american-library-association-lawsuit-trump-cuts.html> (on file with the *Fordham Law Review*); Kwame Anthony Appiah, *Can I Ban Books from My Front-Yard Little Free Library?*, N.Y. TIMES (Jan. 10, 2025), <https://www.nytimes.com/2025/01/10/magazine/little-free-library-ethics.html> (on file with the *Fordham Law Review*).

18. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 857–58 (1982) (plurality opinion); *GLBT Youth*, 114 F.4th at 668.

19. In general, these “bans” remove books from an individual library or library system, though the books generally remain accessible elsewhere. *Banned Book FAQ*, AM. LIBR. ASS'N (Oct. 25, 2016), <https://www.ala.org/bbooks/banned-books-qa> [<https://perma.cc/TC9M-N9EA>].

librarians who comply with the bans of censorship and violating the principle of the freedom to read.²⁰

Part I.A examines the gradual rejection of censorship in early libraries and the adoption of the freedom to read as the principal goal of the public library. Part I.B summarizes the main legal principles in disputes over library curation: the right to receive information, the government speech doctrine, and public forum doctrine.

A. *The History of the Public Library in American Society*

Even in a time of polarization and politicization, public libraries remain one of American society's most beloved institutions.²¹ Sixty-five percent of Americans in 2017 believed libraries "help[ed] them grow as people."²² Many authors have lovingly cited librarians and libraries as key to their development.²³ At the same time, "book bans" are on the rise across the country.²⁴ To understand how these beloved institutions became the site of modern conflict, it is helpful to examine the history of the public library in America.

As the public library developed, the librarian profession has moved through three phases: first, the librarian as moral censor of books, then as maintainer of neutrality throughout the stacks, and finally as guardian of the "freedom to read" beginning in 1939.

1. Librarian as Moral Censor (1700s–1840s)

The role of the librarian as moral censor was present in colonial and early America.²⁵ The modern public library—a local municipal entity funded by

20. Cara S. Bertram, *Censorship Throughout the Centuries: A Timeline of US Book Bans and the Fight for Intellectual Freedom*, AM. LIBRS. MAG. (Sep. 3, 2024), <https://americanlibrariesmagazine.org/2024/09/03/censorship-throughout-the-centuries/> [https://perma.cc/L9GM-L76G]; *Library Bill of Rights*, AM. LIBR. ASS'N (June 30, 2006), <https://www.ala.org/advocacy/intfreedom/librarybill> [https://perma.cc/4SZK-D7RX].

21. See Eric Klinenberg, *How Libraries Can Save the 2020 Election*, N.Y. TIMES (Sep. 3, 2020), <https://www.nytimes.com/2020/09/03/opinion/mail-voting-trump-libraries.html> (on file with the *Fordham Law Review*); see also A.W. Geiger, *Most Americans—Especially Millennials—Say Libraries Can Help Them Find Reliable, Trustworthy Information*, PEW RSCH. CTR. (Aug. 30, 2017), <https://www.pewresearch.org/short-reads/2017/08/30/most-americans-especially-millennials-say-libraries-can-help-them-find-reliable-trustworthy-information/> [https://perma.cc/PH8Z-W2ZJ]; *American Democracy Can Be Found at the Library*, PEW CHARITABLE TRS. (Oct. 7, 2020), <https://www.pew.org/en/research-and-analysis/articles/2020/10/07/american-democracy-can-be-found-at-the-library> [https://perma.cc/Y7Z6-SQGK]; *12 Authors Write About the Libraries They Love*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/books/review/public-libraries.html> (on file with the *Fordham Law Review*).

22. Geiger, *supra* note 21.

23. *12 Authors Write About the Libraries They Love*, *supra* note 21.

24. *Censorship by the Numbers*, AM. LIBR. ASS'N (Apr. 20, 2023), <https://www.ala.org/bbooks/censorship-numbers> [https://perma.cc/6HDR-HEKJ].

25. WAYNE A. WIEGAND, *PART OF OUR LIVES: A PEOPLE'S HISTORY OF THE AMERICAN PUBLIC LIBRARY* 9 (2015).

both local taxes and state and federal grants²⁶—developed out of the “social” and “circulating” library models that existed before the American Revolution.²⁷ Social libraries were created when a small group of patrons contributed to a fund to purchase books that were held in common for the group.²⁸ By contrast, circulating libraries were usually funded by one owner who then rented out the books for a small fee.²⁹ These predecessors to the public library were curated on an ideological basis to serve slightly different missions.³⁰ For example, when Benjamin Franklin started the Library Company of Philadelphia in 1731, he did not include fiction or theology in his social library.³¹ Instead, he wanted patrons to check out only the books that would help them in their gentleman trades.³² Circulating libraries had a financial incentive to include more popular works of fiction and scandal, but their catalogs ultimately depended on the owner.³³ Those owners were almost always wealthy, white, protestant men “who preferred the society of their own kind,” and they restricted both their membership and their catalogs to match.³⁴ One extreme example was the circulating library in Carlisle, Pennsylvania, which adhered to the strict Calvinist theology of its leaders and did not stock fiction despite economic pressure.³⁵

This fear of fiction was not uncommon at the time; many viewed novels as “not just frivolous, but mentally and morally dangerous,” especially for vulnerable women readers.³⁶ Librarian Tom Glynn suggests that there was a gendered aspect to the difference between circulating libraries, which were willing to stock “frivolous and feminine” novels, and social libraries, which were created to increase access to “solid” and “rational” nonfiction.³⁷ As Glynn writes:

26. *Where Does Public Library Funding Come From?*, EVERYLIBRARY (June 28, 2023), https://action.everylibrary.org/where_does_public_library_funding_come_from (on file with the *Fordham Law Review*); *Who Pays for Your Library, Anyway?*, BOZEMAN LIBR. FRIENDS & FOUND., <https://supportbozemanlibrary.org/who-pays-for-the-library-anyway/> [<https://perma.cc/FY8J-EF8G>] (last visited Nov. 3, 2025).

27. WIEGAND, *supra* note 25, at 9.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 8; see also Cheryl Knott, *Uncommon Knowledge: Late Eighteenth-Century American Subscription Library Collections*, in *BEFORE THE PUBLIC LIBRARY: READING, COMMUNITY, AND IDENTITY IN THE ATLANTIC WORLD, 1650–1850*, at 149, 151 (Mark Towsey & Kyle B. Roberts eds., 2018).

32. WIEGAND, *supra* note 25, at 8. Gentlemen trades were professions such as law, the clergy, farming, the military, or medicine. See *id.* at 9 (breaking down one library’s collection as “33 percent high culture literature, 19 percent science, 16 percent history, 13 percent theology, and 8 percent law,” with the “remaining 11 percent consist[ing] of biography, travel, and the agricultural and military sciences”).

33. *Id.* at 8.

34. *Id.* at 19.

35. Knott, *supra* note 31, at 163–64.

36. Tom Glynn, *Reading Publics: Books, Communities and Readers in the Early History of American Public Libraries*, in *BEFORE THE PUBLIC LIBRARY*, *supra* note 31, at 325, 330.

37. *Id.* at 331.

Non-fiction was self-improving and therefore promoted the public good. Fiction was private, self-indulgent and demoralising. The idealised reader thus reflected gendered values that distinguished the public from the private in American culture. Women were, of course, assumed to be the mainstays of circulating libraries . . . this tension between public purpose and popular demand, between the public and private functions of shared reading, was fundamental to the character of American social libraries in the 19th century.³⁸

Libraries and librarians had to balance the moral questions of stocking fiction with the financial incentives of stocking the books people wanted to read.³⁹ The great novelist herself, Jane Austen, poked at this phenomenon in her fictional novel *Northanger Abbey*:

While the abilities of the nine-hundredth abridger of the *History of England* . . . are eulogized by a thousand pens—there seems almost a general wish of decrying the capacity and undervaluing the labour of the novelist, and of slighting the performances which have only genius, wit, and taste to recommend them.⁴⁰

Austen, as she so often did, had the last word. Eventually, both circulating and social libraries succumbed to market pressures and began to carry popular novels.⁴¹ The popularity of fiction was an unstoppable market incentive for social and circulating libraries as they developed into something closer to the modern public library through the first half of the nineteenth century.⁴²

In 1803, one of the first reported municipally funded libraries was established for children ages nine to sixteen in Salisbury, Connecticut.⁴³ School-district libraries were empowered by “most states . . . [to] levy taxes to purchase books not just for pupils in the common schools, but for any resident of the district.”⁴⁴ Although these early public libraries struggled, often closing quickly, they reflected a growing appetite for literature in the American public.⁴⁵

By 1852, the Boston City Council advised the city’s public libraries to stock multiple copies of the most popular books so that multiple families could enjoy them at once.⁴⁶ The City Council believed that these “lighter works” could lead to the working class developing a “taste for books.”⁴⁷ The Boston Public Library was established at the beginning of the truly “public”

38. *Id.* at 331–32.

39. *Id.*

40. JANE AUSTEN, *NORTHANGER ABBEY* 42 (John Murray ed., Lancer Books, Inc. 1968) (1817).

41. Glynn, *supra* note 36, at 337.

42. *Id.*

43. *Id.* at 326.

44. *Id.*

45. *Id.*

46. BOSTON PUBLIC LIBRARY, CITY DOCUMENT—NO. 37. REPORT OF THE TRUSTEES OF THE PUBLIC LIBRARY OF THE CITY OF BOSTON, JULY, 1852 (Leopold Classic Library 2025) (1852).

47. *Id.*

library movement, formalized when New Hampshire and Massachusetts passed legislation permitting cities and towns to “maintain free libraries by taxation.”⁴⁸ As the library became a public service, a new conception of the library and librarian’s role developed.⁴⁹

2. Librarian as Guardian of Neutrality (1840s–1939)

While only eight cities in America had a true public library system in the 1840s, leaders like William F. Poole, Charles Ammi Cutter, and Melvil Dewey consciously established the role of “librarian.”⁵⁰ The American Library Association (ALA) was founded in 1876.⁵¹ A decade later, Dewey developed a formal library education program.⁵² Librarians were educated in the practical skills of “cataloging, classification, book selection, reference service,” and managing the physical library.⁵³ For “theoretical grounding,” librarians were trained by subject-matter experts on the best books in their fields.⁵⁴

At the same time as the profession’s establishment, librarians faced pressures both to increase censorship and increase accessibility to libraries.⁵⁵ The federal government applied pressure when the Comstock Act of 1873⁵⁶ restricted “indecent” material from being sent in the mail.⁵⁷ Local anticevice laws also influenced libraries’ curatorial decisions.⁵⁸ However, the audience for libraries continued expanding due to the increase in literacy during the Industrial Revolution.⁵⁹ Previous social and circulation libraries had served only those wealthy and privileged enough to read.⁶⁰ By the 1870s, the Industrial Revolution created a demand for literate workers.⁶¹ Libraries and librarians looked to their collections “with an eye to . . . employer’s needs,” stocking “useful books that would save employers large sums.”⁶² But they also had to contend with the “consciousness that [the Industrial Revolution] produced: the bitter strikes, new political parties, organs of expression, and modes of analysis; to the new literature and mass media.”⁶³

48. WIEGAND, *supra* note 25, at 26.

49. *Id.*

50. EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876–1939: A STUDY IN CULTURAL CHANGE 17 (1984).

51. WIEGAND, *supra* note 25, at 49.

52. *Id.* at 54. The program’s first class was made up of seventeen women and three men, also starting the gendered nature of the profession. *Id.*

53. *Id.*

54. *Id.*

55. GELLER, *supra* note 50, at 18–20.

56. 18 U.S.C. §§ 1461–1465.

57. WIEGAND, *supra* note 25, at 36; 18 U.S.C. §§ 1461–1462.

58. Bertram, *supra* note 20.

59. WIEGAND, *supra* note 25, at 35–36.

60. GELLER, *supra* note 50, at 18–20.

61. *Id.*

62. *Id.* at 18–19.

63. *Id.* at 45.

In the ALA's first guide for small libraries, published in 1893, "unpleasant subjects" such as "illegitimacy, adultery, and divorce" were allowed, but the guide advised libraries to avoid novels and nonfiction that "attack[ed] . . . organized religion, the family, or society."⁶⁴ In some cases, a famous author would be represented by a less controversial work; for example, the guide recommended a biography of philosopher Jean-Jacques Rousseau instead of any of his own writing.⁶⁵

The professional norm was to maintain neutrality by excluding anything that could be considered a controversial critique of religion, family, or society and by ensuring balance in the opinions represented in political and economic debates.⁶⁶ From a political perspective, "libraries were praised for having met the demand for information on 'both sides' of election issues," largely by stocking both sides' propaganda.⁶⁷

In the 1900s, as the United States entered two World Wars, the public library transitioned to "an active instrument for propaganda."⁶⁸ During World War I, all public libraries were scrubbed of pro-German or pacifist material on the "army index" list of books that were already banned from military base libraries.⁶⁹ While the majority of librarians "pu[t] the role of citizen above that of the professional," others reacted to the censorship by turning to the First Amendment.⁷⁰ This led to a new conception of the librarian as protector of access to ideas.

3. Librarian as Protector of the Freedom to Read (1939–Present)

In 1939, the ALA adopted the Library Bill of Rights (LBR), an aspirational document of the profession's ideals.⁷¹ It sets out a standard for the curation of libraries, including that "[m]aterials should not be excluded because of the origin, background, or views of those contributing to their creation . . . Materials should not be proscribed or removed because of partisan or doctrinal disapproval" and that "[l]ibraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment."⁷²

64. *Id.* at 55–56.

65. *Id.* at 55.

66. *Id.* at 25.

67. *Id.* at 49.

68. WIEGAND, *supra* note 25, at 106.

69. *Id.*

70. GELLER, *supra* note 50, at 109.

71. WIEGAND, *supra* note 25, at 147.

72. AM. LIBR. ASS'N, *supra* note 20. As currently adopted, it reads in full:

I. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation. II. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval. III. Libraries should challenge censorship in the fulfillment of their responsibility to provide

The LBR was a response to government censorship during the first World War, and the LBR's influence was felt in the second.⁷³ While some local libraries across the United States censored their content, other libraries defended the freedom to read as part of the national resistance to the Nazis' censorious policies.⁷⁴ McCarthyism and the Red Scare tested this commitment.⁷⁵ Many libraries "voluntarily withdrew" or "never acquired" controversial materials, while others "fought McCarthyism on LBR principles."⁷⁶ Libraries were also "mostly silent, and largely absent" on integration conflicts.⁷⁷

"Book bans" and controversies over appropriate material have continued, from communism in the 1960s, to satanism in the 1980s, to the modern rejection of "woke" books.⁷⁸ Opponents have resisted censorship attempts by invoking the clearly articulated professional standards announced in the Library Bill of Rights.⁷⁹ This pattern persists to this day: the ALA⁸⁰ and politicians decry efforts at censorship based on LBR principles, while local libraries make decisions based on the desires of their librarians, library boards, and patrons.⁸¹ Each individual public library is chartered and primarily funded by the towns they serve.⁸²

information and enlightenment. IV. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas. V. A person's right to use a library should not be denied or abridged because of origin, age, background, or views. VI. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use. VII. All people, regardless of origin, age, background, or views, possess a right to privacy and confidentiality in their library use. Libraries should advocate for, educate about, and protect people's privacy, safeguarding all library use data, including personally identifiable information. *Id.*

73. GELLER, *supra* note 50, at 109; WIEGAND, *supra* note 25, at 160–64.

74. Much of the censorship during the second world war focused on books about Japanese culture or by Japanese artists. *Id.*

75. *Id.* at 170.

76. *Id.*

77. *Id.* at 172. "At no time during these years did the American Library Association file any amicus brief in federal cases involving the desegregation of public libraries." *Id.* at 175.

78. WIEGAND, *supra* note 25, at 240–48, 261–63.

79. See, e.g., AM. LIBR. ASS'N, *supra* note 19 ("The ALA condemns censorship and works to ensure free access to information."); Bertram, *supra* note 20 ("American Libraries travels through time to outline our country's history of censorship—and the library workers, authors, and advocates who have defended the right to read.").

80. The modern ALA is a "non-profit association, incorporated under the laws of the Commonwealth of Massachusetts." *ALA Legal Framework: Questions and Answers*, AM. LIBR. ASS'N (Apr. 19, 2007), <https://www.ala.org/aboutala/governance/legalguidelines/legalframework/alalegalframework> [<https://perma.cc/VS2R-2BPZ>]. Its mission is to "empower[] and advocat[e] for libraries and library workers to ensure equitable access to information for all." *About ALA & Our Mission*, AM. LIBR. ASS'N (Dec. 6, 2023), <https://www.ala.org/aboutala> [<https://perma.cc/93AL-VGDC>]. The ALA's influence is limited, as it does not set policy or make curation decisions for all public libraries across the country. See WIEGAND, *supra* note 25, at 268–69.

81. See WIEGAND, *supra* note 25, at 268–69. ("No matter how hard the ALA's Office of Intellectual Freedom tries to protest what it calls censorious practices, the American public library still makes decisions at the local level.").

82. See EVERYLIBRARY, *supra* note 26.

Along with the professional commitment to the freedom to read, the ALA has developed consistent guidance on the proper maintenance of a library collection.⁸³ Books are physical media and therefore can be damaged, take up space, and become outdated.⁸⁴ Many libraries use the continuous review, evaluation, and weeding (CREW) method to determine if books are misleading, ugly, superseded, trivial, irrelevant, or obtained elsewhere (the “MUSTIE” factors), and if so, to remove them from circulation.⁸⁵ The ALA, however, cautions that “while weeding is essential to the collection development process, it should not be used as a deselection tool for controversial materials.”⁸⁶

Despite the ALA’s influence over library management and policy, the ideals of the Library Bill of Rights are just that: ideals. Libraries and librarians remain in the middle of the controversy regarding which books to purchase, shelve, and remove.⁸⁷ Until recently, courts had addressed similar controversies about book removals occurring in school libraries, which present unique First Amendment questions because of their educational nature and the age of the audiences.⁸⁸ Courts have not ruled on how these principles translate to the collections of public libraries, which serve a wider audience.⁸⁹ *Little v. Llano County* presented an opportunity to consider how the ideal of the freedom to read interacts with the right to freedom of speech.⁹⁰

B. First Amendment Doctrine and the Classification of the Library

The First Amendment prohibits Congress from enacting any “law . . . abridging the freedom of speech.”⁹¹ Beginning after World War I, questions regarding the scope and boundaries of freedom of speech “bec[a]me a source of frequent controversy and a staple of Court business.”⁹² This section examines some of these controversies to provide a background for how they are discussed in the context of public libraries. Part I.B.1 discusses the right

83. *Collection Maintenance and Weeding*, AM. LIBR. ASS’N (Dec. 25, 2017), <https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/weeding> [https://perma.cc/LDM5-4MYH].

84. *Id.*

85. *Id.*

86. *Id.*

87. *See supra* note 17 and accompanying text.

88. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982); *Campbell v. St. Tammany Parish Sch.*, 64 F.3d 184 (5th Cir. 1995).

89. *See infra* Parts II.A.2–3; *see also* *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1247 (3d Cir. 1992). *See generally* *United States v. Am. Libr. Assoc., Inc.*, 539 U.S. 194 (2003); *Neinast v. Bd. of Trs. of Columbus Metro. Libr.*, 346 F.3d 585 (6th Cir. 2003).

90. *Little v. Llano Cnty.*, 138 F.4th 834, 836 (5th Cir.) (en banc), *cert. denied*, 146 S. Ct. 886 (2025); *see infra* Part II.A.

91. U.S. CONST. amends. I, XIV (incorporating the First Amendment against the states through the Due Process Clause).

92. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 971 (21st ed. 2022).

to receive information, Part I.B.2 examines the government speech doctrine, and Part I.B.3 discusses the public forum doctrine.

1. The Right to Receive Information

The right to receive information developed through First Amendment jurisprudence as a necessary part of the freedom of speech.⁹³ The first reference to it appeared in *Martin v. City of Struthers*⁹⁴ in 1943.⁹⁵ In that case, plaintiff Thelma Martin was arrested for distributing religious pamphlets door-to-door.⁹⁶ The Supreme Court held that the plaintiff's right to distribute information "necessarily protect[ed] the right to receive it" by those interested in the ideas.⁹⁷ This right was upheld in multiple contexts: for workers to hear the speech of a labor organizer,⁹⁸ for American citizens to receive foreign communist propaganda through the post office,⁹⁹ and for patients to receive information on contraception from their doctors.¹⁰⁰

In *Stanley v. Georgia*,¹⁰¹ the Court held that the freedom of speech includes a constitutional "right to receive information and ideas," even when those ideas are obscene.¹⁰² As Justice Thurgood Marshall wrote for the majority, the right protected Robert Stanley's ability to "read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."¹⁰³

The right to receive information prevents the government from stopping one private party from conveying information to another.¹⁰⁴ What is less clear is whether a private party can compel a government entity to provide information.¹⁰⁵ Library cases have frequently cited the right to receive information to challenge censorship.¹⁰⁶ Meanwhile, local governments invoke the government speech doctrine to protect curation decisions.

93. Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 175 (2003) ("The right to receive information has evolved from its early place as a necessary corollary to the right of free speech or as a peripheral or penumbral right without which the primary right would be less secure.").

94. 319 U.S. 141 (1943).

95. Mart, *supra* note 93, at 176.

96. *Martin*, 319 U.S. at 142.

97. *Id.* at 143.

98. See *Thomas v. Collins*, 323 U.S. 516, 540 (1945); see also Mart, *supra* note 93, at 176.

99. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305–07 (1965); see also Mart, *supra* note 93, at 176.

100. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); see also Mart, *supra* note 93, at 176.

101. 394 U.S. 557 (1969).

102. *Id.* at 564.

103. *Id.* at 565.

104. Mart, *supra* note 93, at 186.

105. *Id.* ("The right to receive information does not mean that citizens have unlimited access to all the information the government possesses. Even in cases involving an otherwise willing or available source of information, the Supreme Court has upheld restrictions on the public's right of access.").

106. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 857–58 (1982) (plurality opinion); *Am. Council of the Blind v. Boorstin*, 644 F. Supp. 811, 815 (D.D.C. 1986); *Campbell v. St.*

2. The Government Speech Doctrine

Though Congress is prohibited from passing laws restricting the freedom of speech, it is allowed to “speak” without restriction through its employees, agencies, and offices.¹⁰⁷ This means that while the government may not pass a law prohibiting the expression of a viewpoint, it may publish a statement expressing that viewpoint as its own.¹⁰⁸ “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”¹⁰⁹ Whether or not something is government speech is determined using the three-part test developed in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*¹¹⁰ and *Pleasant Grove City v. Summum*¹¹¹ (the “*Walker/Summum* test”). The test asks “(1) whether the forum in which the speech occurs has historically been used for government speech, (2) whether the public would interpret the speech as being conveyed by the government, and (3) whether the government has maintained control over the speech.”¹¹² As Justice Stephen G. Breyer wrote in *Walker*, “how could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?”¹¹³

In *Walker* and *Summum*, the government rejected a private entity’s request to publicly display its viewpoint. In *Summum*, the plaintiffs wanted the town to display a monument related to their religion.¹¹⁴ In *Walker*, the plaintiffs wanted the state to create a “Sons of the Confederacy” license plate.¹¹⁵ In both cases, the rejections were held to be permissible viewpoint discrimination because the displays in the park and on the license plate were government speech.¹¹⁶

The government is also given broad leeway to fund certain types of speech but not others.¹¹⁷ This is permissible when “the government appropriates

Tammany Parish Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1247 (3d Cir. 1992).

107. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The Establishment Clause places some limits on the government’s ability to “endorse” religious beliefs. See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989), *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860–61 (2005). But see *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 63 (2019) (holding that “the Bladensburg Cross does not violate the Establishment Clause”).

108. *Summum*, 555 U.S. at 467.

109. *Id.*

110. 576 U.S. 200 (2015).

111. 555 U.S. 460 (2009).

112. Christine Bacon, Annotation, *Application of First Amendment Speech Protection to Governmental Entities: Government-Speech Doctrine*, 67 A.L.R. Fed. 3d Art. 4 (2021); *Walker*, 576 U.S. at 209–10; *Summum*, 555 U.S. at 470–71.

113. *Walker*, 576 U.S. at 207.

114. *Summum*, 555 U.S. at 465–66.

115. *Walker*, 576 U.S. at 203.

116. See *Summum*, 555 U.S. at 481; see also *Walker*, 576 U.S. at 219.

117. Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 355 (2016).

public funds to promote a particular policy” by a private entity.¹¹⁸ For example, in *Rust v. Sullivan*,¹¹⁹ the Supreme Court upheld a provision that prohibited federal funds from being used for family-planning services that mentioned abortion:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.¹²⁰

The Court similarly upheld discretionary grant decisions from the National Endowment for the Arts.¹²¹ These decisions were permissible because “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake.”¹²² The government may not, however, restrict speech for viewpoint reasons “when the [government entity] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”¹²³

3. Public Forum Analysis

In spaces owned by the government and maintained for the public, the degree to which speech may be regulated depends on the purpose of the public space.¹²⁴ In some cases, the government may restrict access to its property the same way private owners can¹²⁵—the public is not *guaranteed* access to express its views, but access can be granted by the government.¹²⁶ If the government chooses to allow open expression, courts then determine the type of forum the government has created to identify the permissible regulation of the speech.¹²⁷

The First Amendment allows the government to regulate three types of forums for public speech, each with different standards of review.¹²⁸ The first is the classic or traditional public forum, commonly understood as places like streets and parks that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

118. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *see also Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

119. 500 U.S. 173 (1991).

120. *Id.* at 193.

121. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 578–88 (1998).

122. *Id.*

123. *Rosenberger*, 515 U.S. at 834.

124. “Public spaces” in this section refers to both physical and virtual spaces.

125. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981) (“The First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”).

126. *Id.*

127. *Id.*

128. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

questions.”¹²⁹ The government is permitted to regulate expression in these areas “in the interest of all . . . and in consonance with peace and good order,”¹³⁰ but content-based exclusions generally must satisfy strict scrutiny—the regulation must be necessary to serve a compelling state interest and narrowly drawn to achieve that interest.¹³¹ In a traditional public forum, the state may regulate based on viewpoint pursuant to the various “category” tests (incitement, obscenity, etc.),¹³² but all other regulations must pass strict scrutiny.¹³³ Content-neutral restrictions on the time, place, and manner in which a message is conveyed are permitted but subject to intermediate scrutiny.¹³⁴

The second category is the voluntary (often called designated) public forum.¹³⁵ This refers to “public property which the State has opened for use by the public as a place for expressive activity” and which is bound by the same standards as a traditional public forum for as long as the forum remains open to the public.¹³⁶

The third category is the “limited public forum,” where the government has opened a property only for a specific type of speech.¹³⁷ In a limited public forum, the state may restrict speech in “the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹³⁸ These limits may be on the identity of the speaker, such as a student-only auditorium, the subject matter, or the type of expression.¹³⁹ For example, in *Lehman v. City of Shaker Heights*,¹⁴⁰ the Supreme Court upheld a city restriction on political advertising in its train cars:

In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.¹⁴¹

Each of these concepts—the right to receive information, the government speech doctrine, and public forum analysis—has been discussed in court

129. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

130. *Id.* at 516.

131. *Perry Educ. Ass’n*, 460 U.S. at 45 (quoting *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

132. 16B C.J.S. *Constitutional Law* § 953 (2026).

133. *Perry Educ. Ass’n*, 460 U.S. at 45.

134. *Id.*

135. *Id.*

136. *Id.*

137. Greene, *supra* note 117, at 343, 346 (noting that courts use the term “nonpublic forum” synonymously with “limited public forum,” and also for forums that are not open to the public at all).

138. *Perry Educ. Ass’n*, 460 U.S. at 46.

139. Greene, *supra* note 117, at 346–47.

140. 418 U.S. 298 (1974).

141. *Id.* at 303.

cases regarding library curation decisions.¹⁴² *Little v. Llano County*, however, was the first time a court has held that the curation and deaccession decisions of a *public* rather than school library are government speech.¹⁴³

II. LIBRARIES IN COURT FROM *PICO* TO *LITTLE*

Part II examines the relevant court decisions touching on the interplay between a library's collection and First Amendment principles. Part II.A discusses the history of libraries in court precedent, beginning with Supreme Court decisions and then surveying decisions of the federal courts of appeals. Part II.B then lays out the facts of the case of *Little v. Llano County* and the opinions of the en banc panel.

A. History of Libraries in Precedent

Part II.A.1 examines the Supreme Court's plurality decision in *Pico* and distinguishes its holding as specific to school libraries. Part II.A.2 examines the Court's leading decision on public libraries, *United States v. American Library Ass'n, Inc.*,¹⁴⁴ and the failure of that case to rule on whether public libraries should be considered public fora under the First Amendment. Part II.A.3 surveys relevant appellate decisions.

1. *Pico* and School Libraries

In 1976, the Island Trees School District Board of Education removed nine books from its school libraries, declaring in a press release that the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."¹⁴⁵ Students challenged this removal in court and the school district was granted summary judgment, which was reversed by the U.S. Court of Appeals for the Second Circuit.¹⁴⁶ The Supreme Court granted certiorari to consider two questions: first, whether the First Amendment limited the "discretion" of the school board to remove books from the school libraries, and second, whether summary judgment was properly granted based on the evidentiary materials.¹⁴⁷ The case generated seven opinions.¹⁴⁸

142. See *infra* Part II.A.

143. *Little v. Llano Cnty.*, 138 F.4th 834, 837 (5th Cir.) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

144. 539 U.S. 194 (2003) (plurality opinion).

145. *Bd. of Educ. v. Pico*, 457 U.S. 853, 857–58 (1982) (plurality opinion) (alteration in original).

146. *Id.* at 859.

147. *Id.* at 863; see Johany G. Dubon, Note, *Rereading Pico and the Equal Protection Clause*, 92 FORDHAM L. REV. 1567, 1578 (2024).

148. Justice William J. Brennan Jr. wrote the plurality opinion, joined in full by Justices Marshall and John Paul Stevens and partially by Justice Harry Blackmun. *Pico*, 457 U.S. at 853 (plurality opinion). Justice Blackmun wrote a concurrence in part, and Justice Byron White wrote concurring in the judgment. *Id.* at 875 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 883 (White, J., concurring in the judgment). Chief Justice Warren E. Burger wrote a dissent, joined by Justices Lewis F. Powell Jr., William H. Rehnquist, and Sandra Day O'Connor, who each wrote separately as well. *Id.* at 885 (Burger,

Justice William J. Brennan Jr. wrote for the plurality, noting that whether the removal of books from school libraries constituted a constitutional violation depended on the officials' motivation.¹⁴⁹ School boards are required to exercise their discretion over their students "in a manner that comports with the transcendent imperatives of the First Amendment."¹⁵⁰ Those imperatives include "the right to receive information and ideas."¹⁵¹ While school boards have discretion over ideas in "the compulsory environment of the classroom," the school library affords students "an opportunity at self-education . . . that is wholly optional" and therefore not part of the school's educational mission to "inculcate community values."¹⁵² The board could make decisions to remove books for vulgarity or lack of educational suitability.¹⁵³ Removing books for "narrowly partisan or political" reasons, however, violates the students' right to receive the ideas contained in the book.¹⁵⁴ "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."¹⁵⁵ Summary judgment was therefore inappropriate because a material question of fact existed as to whether the petitioners' decision to remove the books was "narrowly partisan or political."¹⁵⁶

Justice Harry Blackmun agreed with the outcome of the case but would not have based the opinion on Justice Brennan's understanding of the "right to receive information."¹⁵⁷ Instead, he felt the question should be "how to make the delicate accommodation between the limited constitutional restriction that is imposed by the First Amendment, and the necessarily broad state authority to regulate education."¹⁵⁸ Justice Blackmun did not agree with Justice Brennan's categorization of the school library as uniquely outside of the school's function to "inculcate ideas"¹⁵⁹ but agreed that the censorship of topics "for partisan or political reasons" was impermissible.¹⁶⁰ The plurality's holding satisfied his perspective, even if he would construe it as a "narrow principle."¹⁶¹

Justice Byron White concurred in the judgment that the summary judgment should be reversed to allow for "a full record and findings on the

C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

149. *Pico*, 457 U.S. at 871 (plurality opinion).

150. *Id.* at 853.

151. *Id.* at 867.

152. *Id.* at 869.

153. *Id.* at 871.

154. *Id.* at 870.

155. *Id.* at 871.

156. *Id.* at 870.

157. *Id.* at 878 (Blackmun, J., concurring).

158. *Id.* at 879.

159. *Id.* at 878.

160. *Id.* at 879.

161. *Id.* at 880.

critical issues.”¹⁶² He did not, however, join Justice Brennan’s discussion of the First Amendment rights at issue, finding it unnecessary.¹⁶³

In dissent, Chief Justice Warren E. Burger was joined by Justices Lewis F. Powell Jr., William H. Rehnquist, and Sandra Day O’Connor.¹⁶⁴ He argued that Justice Brennan’s view would “allow[] this Court to impose its own views about what books must be made available to students.”¹⁶⁵ As elected representatives of the community, the school board should be allowed to make decisions about which books to provide.¹⁶⁶ If the community disagrees, they should use the ballot to register that disagreement.¹⁶⁷ The dissenters also noted that students looking for the removed books were still “free to read the books in question, which are available at *public libraries* and bookstores.”¹⁶⁸ Justice Rehnquist’s separate dissent, joined by Chief Justice Burger and Justice Powell, “agree[d] fully with the views expressed by the Chief Justice” and further criticized Justice Brennan’s opinion for failing to abide by the district court’s rules regarding granting of summary judgment.¹⁶⁹ Justice Rehnquist did, however, “cheerfully concede” that the suppression of ideas via book removals would be unconstitutional but felt that the “day will not arrive” when Justice Brennan’s hypotheticals would arise.¹⁷⁰

Pico was a case about book removals from *school* libraries, and the justices’ opinions all touch on that location as part of their reasoning.¹⁷¹ Justice Brennan wrote that “[t]he Court has long recognized that local school boards have broad discretion in the management of school affairs” but that discretion “must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”¹⁷² Like Justice Blackmun and Chief Justice Burger, he focused his opinion on the nature of *students’* First Amendment rights.¹⁷³ Taken together, these writings indicate that the justices, although divided on the First Amendment resolution, were united regarding the focus of their analysis being a school library. It is not clear how the justices would analyze a First Amendment question in a public library setting. The only time since *Pico* that the Court has addressed the question of free speech and public libraries was in *United States v. American*

162. *Id.* at 883 (White, J., concurring).

163. *Id.*

164. *Id.* at 885 (Burger, C.J., dissenting).

165. *Id.* at 885–86.

166. *Id.* at 889.

167. *Id.*

168. *Id.* at 886 (emphasis added).

169. *Id.* at 904 (Rehnquist, J., dissenting).

170. *Id.* at 907–08.

171. *Id.* at 863–64, 866 (plurality opinion); *id.* at 876 (Blackmun, J., concurring); *id.* at 885 (Burger, C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 909 (Rehnquist, J., dissenting); *id.* at 921 (O’Connor, J., dissenting).

172. *Id.* at 863–64 (plurality opinion).

173. *Id.* at 866; *id.* at 876–77 (Blackmun, J., concurring); *id.* at 886 (Burger, C.J., dissenting). “[T]he First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.” *Id.* at 866 (plurality opinion).

*Library Ass'n, Inc.*¹⁷⁴ As the next section will discuss, this decision provides some suggestions about how to view the public library under the First Amendment but does not specifically rule on the question of how to classify curation decisions of a public library.

2. *United States v. American Library Association*

In 2000, Congress enacted the Children's Internet Protection Act (CIPA).¹⁷⁵ Under CIPA, public libraries had to install software that would block obscene material from computers to receive federal funding for internet access.¹⁷⁶ The ALA, along with additional libraries, patrons, and web publishers, sued, arguing that the filtering requirements in CIPA violated the First Amendment.¹⁷⁷ The U.S. District Court for the Eastern District of Pennsylvania agreed, holding that CIPA required libraries to unconstitutionally censor access to a public forum created by the inclusion of an internet terminal in the public library.¹⁷⁸ The court analyzed whether "the appropriate forum for analysis is the library's collection as a whole, which includes both print and electronic resources, or the library's provision of Internet access."¹⁷⁹ It held that internet access in public libraries, and *only internet access*, should be considered a public forum and therefore subject to strict scrutiny for content restrictions.¹⁸⁰ It noted that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review."¹⁸¹ CIPA requires its constitutionality to be judged by the district court panel with immediate review by the Supreme Court.¹⁸²

Chief Justice Rehnquist wrote the plurality opinion for the Supreme Court.¹⁸³ The central question presented was whether the filtering systems required by CIPA would force libraries to violate the First Amendment to receive funding for their internet access.¹⁸⁴ Chief Justice Rehnquist held that the district court was wrong to apply public forum principles to the internet.¹⁸⁵ He referenced the "role of libraries in . . . society" and their

174. 539 U.S. 194, 201–03 (2003) (plurality opinion).

175. Pub. L. No. 106-554, 114 Stat. 2763A (2000).

176. *Am. Libr. Ass'n*, 539 U.S. at 200–01.

177. *Id.*

178. *Am. Libr. Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 405 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003) (plurality opinion).

179. *Id.* at 455.

180. *Id.* at 409.

181. *Id.* at 462.

182. Darin Siefkes, Note, *Explaining United States v. American Library Association: Strictly Speaking, a Flawed Decision*, 57 BAYLOR L. REV. 327, 341–42 (2005).

183. Chief Justice Rehnquist was joined by Justice O'Connor, Justice Antonin Scalia, and Justice Thomas. *Am. Libr. Ass'n*, 539 U.S. at 198 (plurality opinion). Justices Kennedy and Breyer each filed separate concurrences in the judgment. *Id.* at 214 (Kennedy, J., concurring in the judgment); *id.* at 215 (Breyer, J., concurring in the judgment). Justice Stevens wrote a dissent, as did Justice David H. Souter, who was joined by Justice Ruth Bader Ginsburg. *Id.* at 220 (Stevens, J., dissenting); *id.* at 231 (Souter, J., dissenting).

184. *Am. Libr. Ass'n*, 539 U.S. at 202 (plurality opinion).

185. *Id.* at 205.

“broad discretion to decide what material to provide to their patrons.”¹⁸⁶ He cited *Arkansas Educational Television Commission v. Forbes*¹⁸⁷ and *National Endowment for Arts v. Finley*¹⁸⁸ to support the proposition that “the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public” and that this principle “also appl[ies] to a public library’s exercise of judgment in selecting the material it provides to its patrons.”¹⁸⁹ Therefore, “a public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, *any more than it collects books in order to provide a public forum for the authors of books to speak*,”¹⁹⁰ and the district court’s public forum analysis was “out of place.”¹⁹¹

Justice Anthony Kennedy concurred in the judgment, as he found the fact that adult library patrons could request to unblock a website meant that there was “little” to the facial challenge to the First Amendment presented by the case.¹⁹² Justice Breyer agreed that the district court’s application of the public forum doctrine was inapplicable and that the statute was ultimately constitutional.¹⁹³ However, he “reach[ed] the plurality’s ultimate conclusion in a different way,” preferring to “apply a form of heightened scrutiny” because “[t]he Act directly restricts the public’s receipt of information.”¹⁹⁴ Weighed this way, he found that the potential harm of the blocking software was “justified by unusually strong governmental interests”—here, protecting children from obscenity.¹⁹⁵ The blocking requirements of CIPA were therefore upheld and the district court was reversed.

In dissent, Justice John Paul Stevens agreed that local libraries’ use of filtering software to prevent children’s access to inappropriate material was lawful.¹⁹⁶ But he did not agree that “it is constitutional . . . to impose [a specific filtering] requirement on” all libraries in the country.¹⁹⁷ The “fundamental defects” in the filtering software resulted in both underblocking of inappropriate material and overblocking of benign material.¹⁹⁸ Considering “an abridgment of speech by means of a threatened denial of benefits” to be “just as pernicious as an abridgment by means of a threatened penalty,”¹⁹⁹ Stevens argued that CIPA forced libraries to comply with a “broad restriction of First Amendment rights, particularly when such

186. *Id.* at 203–04.

187. 523 U.S. 666 (1998).

188. 524 U.S. 569 (1998).

189. *Am. Libr. Ass’n.*, 539 U.S. at 204–05.

190. *Id.* at 206 (emphasis added).

191. *Id.* at 205.

192. *Id.* at 214 (Kennedy, J., concurring).

193. *Id.* at 215 (Breyer, J., concurring).

194. *Id.* at 216.

195. *Id.* at 217.

196. *Id.* at 220 (Stevens, J., dissenting).

197. *Id.*

198. *Id.* at 221–22.

199. *Id.* at 227.

a restriction is unnecessary to accomplish Congress' stated goal."²⁰⁰ Justice David H. Souter, joined by Justice Ruth Bader Ginsburg, agreed with Justice Stevens's critique, but added that "the rule mandates action by recipient libraries that would violate the First Amendment's guarantee of free speech if the libraries took that action entirely on their own."²⁰¹ He critiqued the plurality's characterization of library curation as beyond the scope of the First Amendment, arguing that "[c]ontent-based blocking and removal tell us something that mere absence from the shelves does not."²⁰²

Following the Court's decision in *United States v. American Library Ass'n*, Professor John Gathegi critiqued the Court's side-stepping of the issue of whether the public library is a public or limited public forum.²⁰³ Relying on previous scholarship²⁰⁴ arguing that "a resource should be characterized as a public or nonpublic forum based on the social practices within which it is entrenched," he argued that the Supreme Court should have taken the opportunity in *American Library Ass'n* to not only declare internet terminals in libraries to be public forums but also public libraries as a whole to be public forums.²⁰⁵ He pointed to Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*,²⁰⁶ arguing that reliance upon the government's defined purpose for a particular forum rather than the characteristics and uses of the forum restricts the development of forum analysis generally and prevents courts from recognizing new public forums.²⁰⁷ He further critiqued the Court for "equating the rights of adults in a public library to the rights of students in schools and public libraries."²⁰⁸ Since the social practices of a library include "the facilitation of transmission of ideas," a public library should be considered a traditional public forum like parks and sidewalks.²⁰⁹

Professor Bernard Bell had a different critique of the Court's sidestep. Although he acknowledged that forum analysis "might ultimately prove useful in analyzing public libraries' powers to employ filtering software on their computers . . . the doctrine cannot be applied to public libraries in the conventional way" because the access at issue is not the speakers' but the

200. *Id.* at 231.

201. *Id.* at 231 (Souter, J., dissenting).

202. *Id.* at 241.

203. John Gathegi, *The Public Library as a Public Forum: The (De)Evolution of a Legal Doctrine*, 75 LIBR. Q. 1, 12 (2005) ("[T]he Court not only missed an opportunity to refine the concept of the public forum in modern-day terms but also somehow implied that public library activities are different from other speech activities and are subject to the managerial authority of the government.").

204. See generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) (arguing that public and nonpublic forums should be distinguished based on the type of authority the government has over the space rather than its traditional role).

205. Gathegi, *supra* note 203, at 17.

206. 505 U.S. 672 (1992).

207. Gathegi, *supra* note 203, at 13–14.

208. *Id.* at 14.

209. *Id.* at 17.

recipients'.²¹⁰ He argued that the public library should be seen as "a unique type of forum heretofore unrecognized by the courts . . . for the receipt of information, not for speaking."²¹¹ Professor Bell suggested that courts manage curation decisions in this unique forum by "accord[ing] special deference to the decisions of library professionals while view[ing] with skepticism those decisions reflecting exertion of political pressure on library professionals."²¹²

American Library Ass'n represents the last significant Supreme Court case on libraries, but library controversies have frequently arisen in the federal courts of appeals.²¹³

3. Lower Court Decisions

Several lower court decisions are relevant to the public library and First Amendment jurisprudence.

In *American Council of the Blind v. Boorstin*,²¹⁴ the U.S. District Court for the District of Columbia held that the Librarian of Congress, Daniel J. Boorstin, had violated the First Amendment when he removed *Playboy* from a program that translated popular magazines into braille.²¹⁵ The inclusion of *Playboy* had been the subject of political controversy due to its "sex-oriented" nature.²¹⁶ Given that the blind community relied on the program, the court found that the program was "a government-sponsored means of communicating to a specific group of private individuals" and therefore "a nonpublic forum subject to forum analysis despite the lack of a physical situs."²¹⁷ It further found that "the sole reason [Boorstin] eliminated *Playboy* from the braille program was because he adopted . . . [the] view that the inclusion of *Playboy* in the program was inappropriate given the sexual orientation of the magazine."²¹⁸ The court held this was unconstitutional viewpoint discrimination, and the plaintiffs were granted declaratory judgment.²¹⁹

*Kreimer v. Bureau of Police*²²⁰ involved a plaintiff whose "offensive and disruptive behavior" along with his odor interfered with library employees and patrons.²²¹ The library expelled Richard Kreimer twice for violating its written rules for behavior.²²² Kreimer sued, arguing among other things that

210. Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM'NS L.J. 191, 204 (2001).

211. *Id.* at 237.

212. *Id.* at 231.

213. See *infra* notes 214–70 and accompanying text.

214. 644 F. Supp. 811 (D.D.C. 1986).

215. *Id.* at 813.

216. *Id.*

217. *Id.* at 815. The current Supreme Court would likely use the language "limited public forum." See Greene, *supra* note 117, 338.

218. *Am. Council of the Blind*, 644 F. Supp. at 814.

219. *Id.*

220. 958 F.2d 1242 (3d Cir. 1992).

221. *Id.* at 1247.

222. *Id.*

the rules violated his right to receive information.²²³ The court held that “a public library, albeit the ‘quintessential’ locus for the exercise of the right to receive information and ideas, is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonably be deemed to constitute a traditional public forum.”²²⁴ Instead, “the Library constitutes a limited public forum.”²²⁵ *Kreimer* did not discuss the curatorial decisions of the library in making this ruling.²²⁶ Instead, the holding applied to whether libraries are permitted to restrict access to the physical space of the library.²²⁷ The court’s reasoning as to whether the library was a limited public forum was based on an analysis of the government’s intent in opening the library, the extent of the use of the library, and the nature of the library itself.²²⁸ It found that the library was “intentionally opened” for “*expressive activity*, namely ‘the communication of the written word.’”²²⁹ The library in this case was open to all residents of Morristown but “only for specified purposes: reading, studying, using the Library materials . . . [not] for the exercise of all First Amendment activities.”²³⁰ Finally, although the library’s “purpose is to aid in the acquisition of knowledge through reading, writing and quiet contemplation . . . the exercise of other oral and interactive First Amendment activities is antithetical to the nature of the Library.”²³¹ By opening the library, the government has created a forum in which expressive activity is limited to a specific *type* of speech.²³² Therefore, the library is a limited public forum.²³³

In *Campbell v. St. Tammany Parish School Board*,²³⁴ the Fifth Circuit agreed with the plurality in *Pico* that school libraries could not make viewpoint-based decisions regarding library curation.²³⁵ The book at issue in *Campbell* was *Voodoo & Hoodoo* by Jim Haskins, which was removed from the school district’s libraries after a parent complained “that the Book heightened children’s infatuation with the supernatural.”²³⁶ Other parents sued, arguing that their children’s First Amendment rights had been violated.²³⁷ The U.S. District Court for the Eastern District of Louisiana granted the parents’ second motion for summary judgment, and the school board appealed.²³⁸ The Fifth Circuit relied on *Pico*’s plurality, acknowledging that the opinion represented guidance rather than binding

223. *Id.*

224. *Id.* at 1256.

225. *Id.* at 1259.

226. *Id.*

227. *Id.* at 1259–62; *see also* Mart, *supra* note 93.

228. *Kreimer*, 958 F.2d at 1259–62.

229. *Id.* at 1259.

230. *Id.* at 1260.

231. *Id.* at 1261.

232. *Id.* at 1261–62.

233. *Id.*

234. 64 F.3d 184 (5th Cir. 1995).

235. *Id.* at 190.

236. *Id.* at 186.

237. *Id.* at 187.

238. *Id.*

precedent.²³⁹ The court found that the decision to remove the book at issue “concern[ed] a non-curricular matter” and so “must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter.”²⁴⁰ However, the record below did not, “when viewed in the light most favorable to the School Board, foreclose the possibility that the School Board exercised its discretion within the confines of the First Amendment.”²⁴¹ The court reversed summary judgment and remanded.²⁴²

A few months after the Supreme Court’s decision in *American Library Ass’n*, the U.S. Court of Appeals for the Sixth Circuit held in *Neinast v. Board of Trustees of Columbus Metropolitan Library*²⁴³ that the library’s requirement that patrons wear shoes did not implicate Robert Neinast’s First Amendment right to receive information.²⁴⁴ The Sixth Circuit relied on the reasoning of *Kreimer* to reach this holding. Like *Kreimer*, *Neinast* did not discuss the content of public library collections, only what restrictions may be placed on patrons looking to access the physical space.²⁴⁵

That same year, the U.S. Court of Appeals for the Eleventh Circuit upheld the district court decision in *Gay Guardian Newspaper v. Ohoop Regional Library System*.²⁴⁶ In this case, the public library had made a table with free literature available in its lobby.²⁴⁷ The *Gay Guardian*, a gay rights advocacy newspaper, had been permitted to distribute its issues on the lobby table.²⁴⁸ After it received objections to the *Gay Guardian*’s inclusion, the library restricted the table to only government materials.²⁴⁹ The U.S. District Court for the Southern District of Georgia discussed several issues.²⁵⁰ First, whether librarians may exercise professional judgment and consider community preferences when selecting materials for a public library.²⁵¹ Second, whether librarians may remove or restrict access to materials that have already been accepted by the library.²⁵² Third, whether contributors of materials displayed in a library’s public spaces may challenge the subsequent removal or relocation of those materials.²⁵³ Finally, “whether librarians can engage in a content-neutral forum closing (i.e. remove all content from a

239. *Id.* at 189 (“Even though the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the School Board’s removal decision was based on unconstitutional motives.”).

240. *Id.*

241. *Id.* at 190.

242. *Id.* at 191.

243. 346 F.3d 585 (6th Cir. 2003).

244. *Id.* at 595.

245. *Id.* at 593.

246. *Gay Guardian Newspaper v. Ohoop Reg’l Libr. Sys.*, 90 F. App’x 386, 1364 (11th Cir. 2003).

247. *Id.* at 1364–65.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1364.

252. *Id.*

253. *Id.*

disputed area of a library) solely to avoid disruption and litigation . . . even assuming that viewpoint-discriminating censorship drives part or all of that decision.”²⁵⁴

The district court only found the last issue necessary to resolve the case, concluding that since “a public building’s front lobby is typically considered a *non* public forum,” restricting the front table to only government speech was permissible.²⁵⁵ The district court also noted that “the Library grants access to *The Gay Guardian* and, by definition, all other speech ugly and beautiful—*elsewhere* in the Library.”²⁵⁶ It cited *American Library Ass’n* to support the proposition that “[l]ibrarians may ordinarily take some comfort in the fact that, even when viewed solely as a limited public forum, their content selection/removal decisions need only have a rational basis.”²⁵⁷

One of the most recent cases in this line of library law is *GLBT Youth in Iowa Schools Task Force v. Reynolds*.²⁵⁸ There, the plaintiffs challenged enforcement of Iowa Senate File 496 (“SF496”),²⁵⁹ which “added regulations regarding books in Iowa’s public-school libraries,” imposed regulations on classroom instruction, and required parental notification if a student requested the use of gender pronouns that did not match the school’s records.²⁶⁰ The law was challenged by Iowa students and a nonprofit organization supporting LGBT youth and separately by Penguin Random House, several authors, parents, and educators.²⁶¹

On appeal, the Eighth Circuit specifically considered and rejected the defendant’s argument that “all Plaintiffs lack standing because the removal of books from public school libraries constitutes government speech.”²⁶² Using the three-part *Walker/Sumnum* test,²⁶³ the court was “doubtful that the public would view the placement and removal of books in public school libraries as the government speaking,”²⁶⁴ and that “historically the government of Iowa has not asserted extensive control over removing books from public school libraries.”²⁶⁵ Based on this analysis, the court found that the plaintiffs had standing to challenge the library program in SF496 on First Amendment grounds.²⁶⁶

254. *Gay Guardian Newspaper v. Ohoopsee Reg’l Libr. Sys.*, 235 F. Supp. 2d 1362, 1364 (S.D. Ga. 2002), *aff’d*, 90 F. App’x 386 (11th Cir. 2003).

255. *Id.* at 1369.

256. *Id.*

257. *Id.* at 1371.

258. 114 F.4th 660 (8th Cir. 2024).

259. 2023 Iowa Acts ch. 91.

260. *GLBT Youth*, 114 F.4th at 665–66.

261. *Id.* The U.S. District Court for the Southern District of Iowa combined the cases into a single hearing and enjoined enforcement of the first two provisions of SF496. *Id.* at 666.

262. *Id.* at 667.

263. *See supra* notes 109–16 and accompanying text.

264. *GLBT Youth*, 114 F.4th at 668.

265. *Id.*

266. *Id.* The preliminary injunction was reversed because of the “flawed analysis of the applicable law” regarding the facial challenge. *Id.* at 670.

As these cases demonstrate, the question of a public library's decisions regarding what books to purchase, shelve, and remove sits in an uneasy gray area of the law.²⁶⁷ The Supreme Court has ruled fractiously on similar questions about school libraries.²⁶⁸ Lower courts have held that a library is a limited public forum when it comes to patron access,²⁶⁹ but a plurality of the Supreme Court has explicitly rejected the premise that internet terminals in the public library create a traditional public forum.²⁷⁰ Left unresolved was the question whether a public library's decision to remove a book for content-based reasons presumptively violates a patron's First Amendment rights (implying public forum analysis) or constitutes government speech.

B. *Little v. Llano County Library*

Part II.B.1 lays out the facts of *Little v. Llano County* and briefly discusses the trial court and Fifth Circuit panel's holdings. Part II.B.2 reviews the en banc decision.

1. Factual and Procedural Background

Leila Green Little, the lead plaintiff in *Little v. Llano County*, has a "lifelong love of libraries and reading."²⁷¹ Her family connections to libraries in Texas, and in Llano County specifically, run deep: her father-in-law helped install the bookshelves in the Llano County Library, and her husband's grandparents were founding members of the library association.²⁷² In 2022, Little and her coplaintiffs challenged the Llano County Library's removal of seventeen books.²⁷³

According to the plaintiffs' complaint in the original case, the Llano County Library removed books in three waves.²⁷⁴ First, in August of 2021, three defendants—Llano County Judge Ron Cunningham, Llano County Commissioner Jerry Don Moss, and Llano County Library system Director Amber Milum—removed "inappropriate" children's picture books in response to complaints from members of the community, including defendants Rochelle Wells, Rhonda Schneider, and Bonnie Wallace.²⁷⁵

267. *Little v. Llano Cnty.*, 138 F.4th 834, 836 n.2 (5th Cir.), *cert. denied*, 146 S. Ct. 886 (2025); *GLBT Youth*, 114 F.4th at 668.

268. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (resulting in seven written opinions).

269. *See supra* notes 220–45 and accompanying text.

270. *See* *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 206 (2003) (plurality opinion); *see also supra* notes 188–212 and accompanying text.

271. Garnand, *supra* note 4.

272. *Id.*

273. KVUE Staff, *Llano County Residents Sue Officials, Library Director, Board Members to End Book Bans*, KVUE (Apr. 26, 2022), <https://www.kvue.com/article/news/local/llano-county-residents-sue-book-bans/269-5d0f6122-c92d-407a-b717-b3f023ae57aa> [https://perma.cc/Y5E3-J8W6].

274. Complaint at 9–27, *Little v. Llano County*, No. 22-CV-424, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023).

275. The three defendants were Amber Milum, Jerry Don Moss, and Ron Cunningham. *See* Complaint, *supra* note 274, at 10–11.

Wells, Schneider, and Wallace would all be appointed to the County Library Board, although they were not serving in these roles at the time of the first removals.²⁷⁶ The books in this wave included *In the Night Kitchen* by Maurice Sendak and *It's Perfectly Normal* by Robie H. Harris and Michael Emberley.²⁷⁷ Both books depict nudity: *The Night Kitchen* depicts a naked toddler dreaming he is falling through the sky in one illustration;²⁷⁸ *It's Perfectly Normal* is an illustrated sexual education manual for children nine years and older.²⁷⁹ The library also removed two series of picture books about bodily functions from the shelves without receiving complaints.²⁸⁰

Second, in October, the defendants moved “certain books intended for children and teens into a segregated shelf in the adult section of the library” so that they could not be checked out without a parent’s permission.²⁸¹ Finally, in late October, then–Texas State Representative Matthew Krause sent a list of 850 books to various Texas educational agencies and school districts.²⁸² He asked the recipients to confirm whether they had any of the listed books and if so, to account for their whereabouts and purchase costs.²⁸³ Several defendants in the case cross-referenced Krause’s list with Llano County’s collection.²⁸⁴ A list of books appearing in the library was circulated among the defendants and library staff.²⁸⁵ In November of 2021, the library removed several books related to either critical race theory (CRT) or the LGBTQ+ community.²⁸⁶ Additionally, the library terminated patrons’ access to OverDrive, an e-and-audio-book service.²⁸⁷ Throughout this time period, defendants repeatedly communicated their distaste for the removed books over email, using language like “filth”²⁸⁸ and calling them “CRT and LGBTQ” books.²⁸⁹ In response, the plaintiffs, including Leila Green Little, brought suit, alleging that “[d]efendants deprived Plaintiffs of their

276. *Id.*

277. *Id.*

278. See generally MAURICE SENDAK, *IN THE NIGHT KITCHEN* (1970) (a children’s book that tells the story of a little boy who dreams about a magical bakery); see also WIEGAND, *supra* note 25, at 215–16.

279. See generally ROBIE H. HARRIS & MICHAEL EMBERLEY, *IT’S PERFECTLY NORMAL: CHANGING BODIES, GROWING UP, SEX, GENDER, AND SEXUAL HEALTH* (1994) (an illustrated guide to puberty, reproduction, and sexual health).

280. The series were *Fart Dictionaries* and *Toot Along Stories: Larry the Farting Leprechaun, Gary the Goose and His Gas on the Loose, Freddie the Farting Snowman*, and *Harvey the Heart Has Too Many Farts*, all by Jane Bexley, and the *My Butt* books: *My Butt Is So Noisy!*, *I Broke My Butt!*, and *I Need a New Butt!*, all by Dawn McMillan. See Complaint, *supra* note 274, at 11–12.

281. *Id.* at 13.

282. Bill Chappell, *A Texas Lawmaker Is Targeting 850 Books That He Says Could Make Students Feel Uneasy*, NPR (Oct. 28, 2021, at 13:00 ET), <https://www.npr.org/2021/10/28/1050013664/texas-lawmaker-matt-krause-launches-inquiry-into-850-books> [https://perma.cc/3UMP-5KPD].

283. *Id.*; see also Complaint, note 274, at 14.

284. Complaint, *supra* note 274, at 15.

285. *Id.*

286. *Id.*

287. *Id.* at 18–19.

288. *Id.* at 13, 15.

289. *Id.* at 15.

constitutional right to access and receive information and ideas by removing the Banned Books and permanently terminating OverDrive access without providing any prior notice.”²⁹⁰

The district court judge hearing the case, Judge Robert Pitman, ordered the “[d]efendants to return all the books at issue to the Library System, . . . update the Library System’s searchable catalog to reflect that these books are available for checkout” and he enjoined the defendants “from removing any more books for the pendency of this action.”²⁹¹ He held that the plaintiffs had “clearly met their burden to show that these are content-based restrictions that are unlikely to pass constitutional muster.”²⁹²

The defendants appealed the injunction to the Fifth Circuit. The three-judge panel wrote three opinions: a plurality, a concurrence in part, and a dissent.²⁹³ The plurality would have upheld the injunction, but the concurrence in part modified it to apply only to eight of the seventeen books: the “Butt and Fart Books” were kept off the shelves.²⁹⁴

2. En Banc Opinion

Little was reheard en banc by the Fifth Circuit.²⁹⁵ Judge Stuart Kyle Duncan’s opinion was joined in full by seven judges, with three additional judges joining the opinion only in part.²⁹⁶ The majority reversed the preliminary injunction and dismissed the plaintiffs’ free speech claims for “two separate reasons[:]. . . plaintiffs cannot invoke a right to receive information to challenge a library’s removal of books” and “a library’s collection decisions are government speech and therefore not subject to Free Speech challenge.”²⁹⁷

Judge Duncan rejected the plaintiffs’ right to receive information argument.²⁹⁸ The right to receive information protects individuals from having their access to another person’s speech limited by the government.²⁹⁹ In this case, however, the plaintiffs were “invok[ing] a right to receive

290. *Id.* at 29.

291. *Little v. Llano Cnty.*, No. 22-CV-424, 2023 WL 2731089, at *1 (W.D. Tex. Mar. 30, 2023), *aff’d as modified*, 103 F.4th 1140 (5th Cir. 2024), *reh’g en banc granted, opinion vacated*, 106 F.4th 426 (5th Cir. 2024), *and rev’d and remanded*, 138 F.4th 834 (5th Cir. 2025) (en banc), *cert. denied*, 146 S. Ct. 886 (2025). At trial, the defendants made a motion to dismiss, while the plaintiffs moved for a preliminary injunction. *Id.* at *1. The district court judge, Judge Robert Pitman, partially granted both the dismissal and the preliminary injunction. *Id.* The claims dismissed were those related to the OverDrive e-book system. *Id.*

292. *Id.* at *11.

293. *Little v. Llano Cnty.*, 103 F.4th 1140, 1157 (5th Cir. 2024), *reh’g en banc granted, opinion vacated*, 106 F.4th 426 (5th Cir. 2024), *and rev’d and remanded*, 138 F.4th 834 (5th Cir. 2025) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

294. *Id.* at 1157–59.

295. *Little v. Llano Cnty.*, 138 F.4th 834 (5th Cir.) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

296. *Id.* at 836 n.†.

297. *Id.* at 836–37.

298. *Id.* at 842–43.

299. *See id.*

information from the *government*.”³⁰⁰ Judge Duncan also rejected *Pico*’s precedential weight in this case.³⁰¹ *Pico*’s split opinions meant that the narrowest holding—Justice White’s—was the only one with weight, and it “said nothing about the First Amendment.”³⁰² Further, Judge Duncan found that “a majority of the Justices [in *Pico*] rejected the idea that someone’s ‘right to receive information’ requires a library to shelve particular books.”³⁰³ Expanding the right that far would open libraries to challenges not just for removals but also for refusing to purchase books.³⁰⁴ He rejected the idea that viewpoint discrimination was unconstitutional in this setting, writing that “libraries must have discretion to keep certain ideas—certain viewpoints—off the shelves.”³⁰⁵ The Fifth Circuit therefore overruled its previous holding in *Campbell*.³⁰⁶

Writing now for a plurality, Judge Duncan addressed whether a library’s collection decisions are government speech or “a public forum for third-party speech.”³⁰⁷ He concluded that “the speaker is the one who selects, compiles, and presents” speech, with the speaker in this case being the Llano County government.³⁰⁸ Using the *Walker/Summum* test, he found that all three factors were met.³⁰⁹

First, he weighed the history of the speech.³¹⁰ He pointed to the history of censorship in the early library to support his interpretation of the first prong of the *Walker/Summum* test.³¹¹ He referenced the curation of circulating and social libraries and the educational mission of the early public library through the 1850s.³¹² For Judge Duncan, “the lesson from this historical sketch is obvious: by shaping their collections, public libraries were speaking, loudly and clearly, to their patrons.”³¹³

Next, he considered whether the public would perceive the speech as coming from the government. He argued that the patrons of a library will understand that a government employee has selected the books on the shelves and will interpret that as government speech:

[S]uppose a patron walks into the Llano County Public Library looking for Stephen King’s *Salem’s Lot*. It’s nowhere to be found. In fact, he’s told that the library stocks none of King’s books because they are morbid trash. Annoyed, the patron wants to lodge a complaint. *Question*: should he

300. *Id.* at 843.

301. *See id.* at 844.

302. *Id.*

303. *Id.*

304. *Id.* at 846.

305. *Id.* at 848.

306. *Id.* at 850.

307. *Id.* at 851.

308. *Id.* at 852.

309. *Id.*

310. *Id.* at 861.

311. *Id.* For a deeper look at the history discussed by Judge Duncan, *see supra* notes 25–70 and accompanying text.

312. *Little*, 138 F.4th at 861–62.

313. *Id.*

address his complaint to (a) the Library Board; (b) other patrons; or (c) Stephen King? Answer: (a). Any reasonable library patron would grasp this instantly.³¹⁴

To Judge Duncan, this demonstrated that library patrons were not interpreting the “speech” at issue to be the contents of *Salem’s Lot* but the message that the library’s inclusion or exclusion sends about the novel’s literary or educational worth.³¹⁵

Finally, Judge Duncan considered the extent to which the speech is actively controlled by the government.³¹⁶ He concluded that public libraries “have been shaping their collections for specific educational, civic, and moral purposes” throughout their history.³¹⁷

Judge Stephen A. Higginson wrote the dissent, which was joined by six other judges.³¹⁸ Judge Higginson spent the first part of his dissent detailing the facts the lower court and original panel found regarding the motivation behind the removal of the seventeen books at issue.³¹⁹ He reasoned that the court should focus narrowly on whether the grant of a preliminary injunction was an abuse of discretion.³²⁰ Instead, however, the majority “has rushed to sanctify government removal of public library books . . . without identifying any legal principle that can support its abridgment of the First Amendment.”³²¹ Then, he disagreed with the majority’s reading of *Pico*, finding instead that “twin principles—the right to receive information and the right to be free from officially prescribed orthodoxy—are endorsed across the Supreme Court’s spectrum of opinions in *Pico*.”³²² He further critiqued the majority’s rejection of *Pico* and *Campbell* as guidance in this case.³²³ “[T]he Court’s judgment in *Pico* requires us to permit the district court to adjudicate conclusively whether Defendants’ substantial motivation for removing books from the . . . library system was . . . to censor what Defendants deemed ‘inappropriate’ ideas and information.”³²⁴ Judge Higginson maintained that the Llano County Library violated the plaintiffs’

314. *Id.* at 864.

315. *See id.* at 865.

316. *Id.* at 860–65.

317. *Id.* at 865. Judge James C. Ho wrote separately in concurrence, emphasizing that the First Amendment “ensures that citizens are free to speak—not that we may force others to respond. It’s the First Amendment, not FOIA.” *Id.* at 866 (Ho, J., concurring). Judge Ho spent most of his concurrence comparing the issues in *Little* to the previous Fifth Circuit case *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024). *Little*, 138 F.4th at 866 (Ho, J., concurring) (citing *Villarreal*, 94 F.4th 374). The comparison is not relevant to the questions explored in this Note.

318. *Little*, 138 F.4th at 869 (Higginson, J., dissenting).

319. *Id.* at 869–73; *see also supra* notes 274–90 and accompanying text.

320. *See Little*, 138 F.4th at 873.

321. *Id.*

322. *Id.* at 874. Compare *id.* (Judge Higginson interpreting of the *Pico* opinion as endorsing the right to receive information), with Dubon, *supra* note 147, at 1577–81 (describing both Justice Blackmun’s concurrence and the dissents as rejecting the right to receive information).

323. *Little*, 138 F.4th at 877.

324. *Id.* at 879–80.

right to be free from government censorship of disfavored ideas.³²⁵ He also pointed out that by classifying library curation as government speech, “there is nothing to stop government officials from removing from a public library every book referencing women’s suffrage, our country’s civil rights triumphs, the benefits of firearm ownership, the dangers of communism, or, indeed, the protections of the First Amendment.”³²⁶

Following the en banc decision, the plaintiffs in *Little* petitioned the Supreme Court for a writ of certiorari but were denied.³²⁷ *Little* therefore stands in the Fifth Circuit, but it is likely that the split with the Eighth Circuit’s *GLBT Youth* opinion will only deepen.³²⁸ Two district court cases, *Penguin Random House LLC v. Gibson*³²⁹ and *E.K. ex rel. Keeley v. Department of Defense Education Activity*,³³⁰ have already declined to follow *Little* in a school library setting. Another case, *O.R. ex rel. Rogers v. Greenville County*,³³¹ has declined to follow *Little* in a public library case.³³²

III. TRADITIONAL PUBLIC LIBRARIES, LIMITED PUBLIC FORUMS

Courts should not consider public library curation decisions to be government speech. Instead, a library’s collection should be considered a limited public forum.³³³ Part III.A rejects the arguments presented by the Fifth Circuit for classifying library curation as government speech. Part III.B argues that the library should instead be considered a limited public forum.

A. Library Curation Is Not Government Speech

The Fifth Circuit plurality in *Little* determined that the library’s collection decisions pass the *Walker/Summum* test and are therefore government speech.³³⁴ This section examines the three prongs of the *Walker/Summum* test as they apply to library collection decisions and rejects the majority’s analysis.

325. *Id.* at 885. A positive right, in this setting, would be a right to have certain books on the shelves. *Id.* at 886. Framing the matter as a negative right shifts the focus from a right to receive information to a right against a certain kind of state censorship. *Id.*

326. *Id.* at 885.

327. Petition for Writ of Certiorari, *Little v. Llano Cnty.*, 146 S. Ct. 886 (2025) (No. 25-284).

328. *Little v. Llano Cnty.*, 138 F.4th 834, 837 (5th Cir.) (en banc), *cert. denied*, 146 S. Ct. 886 (2025).

329. 796 F. Supp. 3d 1052 (M.D. Fla. 2025); *id.* at 1069.

330. 807 F. Supp. 3d 517 (E.D. Va. 2025); *id.* at 538 n.6.

331. No. 25-CV-02599, 2026 WL 815913 (D.S.C. Mar. 19, 2026).

332. *Id.* at *8.

333. See *infra* notes 378–89 and accompanying text.

334. See *Little*, 138 F.4th at 851–66 (majority opinion).

1. The Library Has Not Historically Been Used for Government Speech

Judge Duncan argues that the history of the library is one of censorship.³³⁵ As noted in Part I, this is accurate regarding the early public library until the late 1930s.³³⁶ But to focus only on the early history of the library ignores the practices of modern libraries. Per the ALA's Library Bill of Rights, the modern library is generally committed to the "freedom to read" and opposed to any restriction on what books a library carries.³³⁷ While the Library Bill of Rights has only ever been "abstract democratic rhetoric" carrying "no penalties for violations," it nonetheless reflects a professional consensus "that librarians ha[ve] a responsibility to fight censorship."³³⁸ The effect of that commitment is shown in patrons' belief that the library is a place to find trustworthy and reliable information.³³⁹ Americans do not have the same trust in information from the government.³⁴⁰ As Justice Alito pointed out in *Walker*, speech can begin as government speech and "cross[s] the line" into private speech.³⁴¹ The library crossed this line in the 1930s, when the librarian profession developed the freedom to read as a principle.³⁴²

Little was not the first time the idea of a library as government speech was discussed. For example, in *People for the Ethical Treatment of Animals, Inc. v. Gittens*,³⁴³ the court wrote in dicta that "with respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude."³⁴⁴ Some proponents of the library as

335. *Id.* at 861–64.

336. See *supra* notes 25–40 and accompanying text.

337. *Labeling and Rating Systems: An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS'N (July 31, 2025), <https://www.ala.org/advocacy/intfreedom/librarybill/interpretations/labelingratingsystems> [<https://perma.cc/2JX8-G3U3>] ("The American Library Association (ALA) affirms that everyone has the right to form their own opinions about the things they read, listen to, or watch. Libraries do not support, endorse or promote the ideas found in the materials or resources they provide. Offering access to a book or digital resource doesn't mean the library agrees with its contents. Labeling and rating systems can conflict with the principles of intellectual freedom.").

338. See WIEGAND, *supra* note 25, at 147.

339. See PEW CHARITABLE TRS., *supra* note 21.

340. *The State of Public Trust in Government 2025*, P'SHIP FOR PUB. SERV. (Aug. 12, 2025), <http://ourpublicservice.org/publications/the-state-of-public-trust-in-government-2025/> [<https://perma.cc/8TVX-RPNE>]; Allison Carter, *Government Communicators Think Most Americans Trust Government Info. The Public Disagrees*, RAGAN PR DAILY (Feb. 20, 2024), <https://www.prdaily.com/government-communicators-think-most-americans-trust-government-info-the-public-disagrees/> [<https://perma.cc/8TVX-RPNE>].

341. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 230 (2015) (Alito, J., dissenting) ("It was not until the 1990's that motorists were allowed to choose from among 10 messages, such as 'Read to Succeed' and 'Keep Texas Beautiful.' . . . Up to this point, the words on the Texas plates can be considered government speech. The messages were created by the State, and they plausibly promoted state programs. But when, at some point within the last 20 years or so, the State began to allow private entities to secure plates conveying their own messages, Texas crossed the line.").

342. See *supra* notes 71–87 and accompanying text.

343. 414 F.3d 23 (D.C. Cir. 2005).

344. *Gittens*, 414 F.3d at 28.

government speech use this line of dictum to look to precedents where the government has acted as a curator, such as in *Finley*.³⁴⁵ However, this argument misinterprets the role of the librarian and the differences between a library and museum. Both institutions collect and store art in the term's broadest sense, but a museum functions to create a shared space where patrons interact with the art, with each other, and within a space that has been designed to convey a message from the curator.³⁴⁶ Conversely, the library functions to connect individuals to information privately.

A plausible argument can be made that libraries as they existed before the rise of the public library were run by curators: individuals making decisions with a specific purpose to shape their collections.³⁴⁷ But when the public library movement took off, the government consciously stepped into a new role: that of the *librarian*.³⁴⁸ The roles are similar but ultimately distinct. According to the U.S. Bureau of Labor Statistics, "librarians and library media specialists help people find information and conduct research for personal and professional use"³⁴⁹ while "curators oversee institutions' collections, such as of historical items or of artwork."³⁵⁰

There is overlap between the two roles. For example, a plausible argument can be made that when a library sets up a recommended reading display, it is acting as a curator and that recommendation is government speech.³⁵¹ But for the most part, the public library is not curating its collection in the same way a museum curates its galleries.³⁵² Libraries collect useful resources

345. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 573–74 (1998); *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–90 (1969).

346. *Cf.* Robin Pogrebin, *What Does It Take to Run a Museum?: The Job Description Is Changing*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/06/arts/museum-directors-challenges.html> (on file with the *Fordham Law Review*) (describing the evolution of the work of a curator).

347. *See supra* notes 25–40 and accompanying text.

348. *Occupational Outlook Handbook: Librarians and Library Media Specialists*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/education-training-and-library/librarians.htm> [<https://perma.cc/BLU4-C3M3>] (last visited May 14, 2026).

349. *Id.*

350. *Occupational Outlook Handbook: Archivists, Curators, and Museum Workers*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/education-training-and-library/curators-museum-technicians-and-conservators.htm> [<https://perma.cc/ADN3-S3BY>] (last visited May 14, 2026); *see also* *The Art of Curating: How Exhibitions Shape the Fine Arts Experience*, ROCKY MOUNTAIN COLL. OF ART (Nov. 24, 2025), <https://www.rmcd.edu/blog/the-art-of-curating-how-exhibitions-shape-the-fine-arts-experience/> [<https://perma.cc/TJ63-QDG6>] ("Art curation is the strategic process of collecting and presenting art, and it plays a prominent role in developing museum exhibition design and art gallery development.").

351. For examples of curated exhibitions, *see In the Galleries*, THE MUSEUM OF MOD. ART, <https://www.moma.org/calendar/exhibitions> (on file with the *Fordham Law Review*) (last visited June 22, 2026); *Exhibitions*, THE METRO. MUSEUM OF ART, <https://www.metmuseum.org/exhibitions> [<https://perma.cc/MT43-AGY9>] (last visited June 22, 2026). Similarly, film and theater festivals curate their selections, often based on criteria or a theme. *See* SUBMITTING YOUR PROJECT TO THE 2026 SUNDANCE FILM FESTIVAL, SUNDANCE INST., https://www.sundance.org/wp-content/uploads/2025/05/2026_Submissions_FAQ-1.pdf [<https://perma.cc/44XY-R86C>].

352. *Compare* ROCKY MOUNTAIN COLL. OF ART, *supra* note 350 (describing how curators must "identify the scope of their work by framing questions and establishing learning objectives for the exhibit"), *with* *Selection Criteria*, AM. LIBR. ASS'N (Jan. 2018),

based on many factors, including their individual merit or demand, but not necessarily to add to a specific exhibition or theme.³⁵³ When Melvil Dewey started his library education program at Columbia University, he taught his students “how to acquire these new literatures (book selection), how to organize them (cataloging and classification), where to look in collections they had already amassed for answers to questions asked of them by patrons (reference), and finally, how to govern the library (management).”³⁵⁴ These four skills still operate at the heart of the library profession today.³⁵⁵ This history demonstrates that since the 1930s,³⁵⁶ the collection of a library has not been government speech.

2. The Public Will Not Interpret the Collection of a Library to Be Government Speech

The variety of viewpoints expressed in a library demonstrate that the average patron will not perceive the library’s catalog as the library’s speech. As the court in *GLBT Youth* wrote,

A well-appointed school library could include copies of Plato’s *The Republic*, Machiavelli’s *The Prince*, Thomas Hobbes’ *Leviathan*, Karl Marx and Friedrich Engels’ *Das Kapital*, Adolph Hitler’s *Mein Kampf*, and Alexis de Tocqueville’s *Democracy in America*. As Plaintiffs noted, if placing these books on the shelf of public school libraries constitutes government speech, the State “is babbling prodigiously and incoherently.”³⁵⁷

The goal of a library collection is not to present a particular thesis but to provide access to the broadest array of information.³⁵⁸ The development of the Dewey Decimal cataloguing system “rested on a conviction that applying a universal classification scheme . . . [would provide] a reliable way for

<https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/criteria> [<https://perma.cc/96PX-CJCJ>] (providing a sample selection policy that “should take into account the various interests and needs of the patrons the library serves” and should “depend on the goals and mission of that particular library.”).

353. See, e.g., AM. LIBR. ASS’N, *supra* note 352 (“The criteria should be relevant to the library’s objectives: excellence . . . appropriateness . . . authoritative and varying perspectives . . . accessibility . . . Librarians should consider authenticity, public demand, general interest, content, and circumstances of use.”); *Acquisitions Procedures*, AM. LIBR. ASS’N (Jan. 2018), <https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/acquisitions> [<https://perma.cc/EKE9-V2C4>] (“The specific procedures for acquiring material for a library’s collection will vary between library types and individual libraries. Patron recommendations for acquisitions are often encouraged in all library types.”).

354. WIEGAND, *supra* note 25, at 55.

355. *Guidelines for Choosing a Master’s Program in Library and Information Studies*, AM. LIBR. ASS’N (June 10, 2008), <https://www.ala.org/educationcareers/accreditedprograms/guidelines-choosing-masters-program-library-and-information-studies> [<https://perma.cc/W86H-YZWM>].

356. See *supra* notes 25–40 and accompanying text.

357. *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660, 668 (8th Cir. 2024) (quoting *Matal v. Tam*, 582 U.S. 118, 236 (2017)).

358. See AM. LIBR. ASS’N, *supra* note 352.

patrons to retrieve the useful knowledge that would inform them about their culture, economy, and government.”³⁵⁹ These books are not expected to be in conversation with each other in the same way that paintings next to each other in a gallery are. That is how *Critical Race Theory: An Introduction* by Professor Richard Delgado (a legal textbook whose theories are aligned with progressive politics) can sit comfortably in the 342.73 section of the Dewey Decimal system next to *Kids Are Americans Too* by Bill O’Reilly and his co-author Charles Flowers (a children’s book reflecting author and Republican intellectual O’Reilly’s conservative political views).³⁶⁰ The average patron will understand that the books presented in the 342.73 section are not meant to express the government’s perspective on the correct method to interpret constitutional law but to make as many of the existing interpretations available for the public to consider for themselves. As this example demonstrates, the collection of a library does not pass the second prong of the *Walker/Summum* test.

3. The Government Has Not Maintained Control Over the Speech

The final prong of the *Walker/Summum* test is whether the government has maintained control over the speech. In *Walker*, Texas law provided that the state had sole control over the design elements of the license plates,³⁶¹ and in *Summum*, the city exercised “final approval authority” over monument selection in the park.³⁶² Libraries are usually governed at the local level without the granularity with which the State controlled license plates in *Walker*. In Texas, for example, state law allows for the creation of county libraries overseen by county librarians who serve at the pleasure of the commissioners court.³⁶³ They “develop and manage the library in accordance with accepted rules of library management and shall determine which books and library equipment will be purchased.”³⁶⁴ The county has a great deal of power over the selection of the librarian for the county, but, once the librarian is selected, there is no expectation that the local government will approve every selection made by the county librarian.³⁶⁵

The Supreme Court weighed in on what qualifies as sufficient government control to meet the third prong of the *Walker/Summum* test in *Matal v. Tam*³⁶⁶

359. WIEGAND, *supra* note 25, at 50.

360. *Selected Works Under MDS 342.73 (5,465)*, LIBRARYTHING, <https://www.librarything.com/mds/342.73> (on file with the *Fordham Law Review*) (last visited Dec. 4, 2025).

361. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 214 (2015).

362. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

363. TEX. LOC. GOV’T CODE ANN. § 323.006 (West 2025). The county librarian is also “under the supervision of the state librarian who, in person or by an assistant, shall periodically visit the library, inquire as to its condition, advise the librarian and the commissioners court about the library, and give whatever assistance possible in matters that relate to the library.” *Id.*

364. TEX. LOC. GOV’T CODE ANN. § 323.005 (West 2025).

365. *See id.*

366. 582 U.S. 218 (2017).

and *Shurtleff v. City of Boston*.³⁶⁷ In *Matal*, the Court found the process of approving trademarks was so perfunctory that it could not be considered direct control as in *Walker*.³⁶⁸ In *Shurtleff*, the Court found the City of Boston had not maintained sufficient control over flags raised because the city had never previously requested to review flags before they were flown.³⁶⁹ The maintenance of library collections is far more similar to the trademarks in *Matal* or the flags in *Shurtleff* than to the license plates in *Walker* or monuments in *Summum*.³⁷⁰

In *Matal*, the Court noted that the government's argument regarding trademarks would also extend to copyright registration, stripping books submitted for copyright from First Amendment protection.³⁷¹ This "worrisome" implication applies just as strongly to *Little*'s classification of library curation as to government speech.³⁷² Just like Justice Alito wrote in his dissent in *Walker*, permitting the removal of books based on their contents would "establish[] a precedent that threatens private speech that government finds displeasing."³⁷³

B. Library Collections Are a Limited Public Forum

Forum analysis is also a multipart test: first, whether the speech at issue is protected by the First Amendment; second, what type of forum it is, determined by the purpose, extent of the use, and the intent of the government in creating the facility; and third, applying the appropriate First Amendment test.³⁷⁴ In traditional and designated public forums, the applicable standard is strict scrutiny for content-based state action unless the speech falls within a regulable category.³⁷⁵ In limited public forums, reasonable content-based decisions are permissible but viewpoint-based decisions are not.³⁷⁶

The first question of forum analysis is easily disposed of: the speech at issue, here the contents of the book, is clearly protected by the First Amendment so long as the contents do not fall within one of the regulable categories.³⁷⁷ The remaining analysis focuses on what type of forum in which the speech occurs. The collections of a public library should be

367. 142 S. Ct. 1583 (2022); *id.* at 1592–1593.

368. *Matal*, 582 U.S. at 244.

369. *Shurtleff*, 142 S. Ct. at 257.

370. See *Matal*, 582 U.S. at 244; *Shurtleff*, 142 S. Ct. at 257; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 204–05 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

371. *Matal*, 582 U.S. at 239.

372. *Id.*

373. *Walker*, 576 U.S. at 221 (Alito, J., dissenting).

374. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:11–13, Westlaw (database updated Apr. 2026); see also *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

375. See *supra* notes 124–41 and accompanying text.

376. See *supra* notes 124–41 and accompanying text.

377. The regulable categories include: defamation, obscenity, or incitement to violence. See 16B C.J.S. *Constitutional Law* § 953.

considered a limited public forum. A limited public forum is created when the government opens a space for expression on specific topics or by specific groups.³⁷⁸ The content restrictions that make up the boundaries of these forums are subject to a reasonableness standard, but viewpoint discrimination aimed at suppressing a specific message is unconstitutional.³⁷⁹

1. Protecting the Traditional Role of the Library

Public libraries are not traditional public forums like streets, sidewalks, and parks.³⁸⁰ Although Professor John Gathegi argued for libraries to be considered traditional public forums,³⁸¹ this classification would be as inappropriate as the government speech argument. The collections of public libraries should not be considered a designated public forum for the same reason. Not all speech is accepted at the library, nor should it be. While limited public forums usually focus on a particular topic or membership group, the library is open to only certain kinds of speech: mostly published books, but potentially other media types that are easily lent out, like magazines, DVDs, CDs, or video-game discs.³⁸² The traditional CREW method—where books are removed based on the MUSTIE factors—would be permissible under this classification.³⁸³ The purpose of the library is to provide access to information. Libraries do this by collecting and organizing books and directing patrons toward resources that can meet their needs. Protecting access to the public library should not require that libraries automatically accept a handwritten manifesto or a home-burned mixtape for inclusion in their stacks. However, classification as a limited public forum would mean that the library may not reject the manifesto or the mixtape for the viewpoints expressed within. It could only reject them for failing the county's established MUSTIE criteria. The library would probably be on solid ground here, as it could reject the manifesto and the mixtape as either ugly, trivial, misleading, or all three.

Classifying the collections of public libraries as a limited public forum protects libraries from having to accept all books offered to them. It also protects patrons from the restriction of their right to receive information based on viewpoint discrimination.³⁸⁴

378. 1 SMOLLA, *supra* note 374, § 8.5.

379. See *supra* notes 124–41 and accompanying text.

380. See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 954–55 (1983).

381. See Gathegi, *supra* note 203, at 2.

382. Cf. Juhie Bhatia, *Ten Unexpected Things to Check Out at Public Libraries*, MELLON FOUND. (Oct. 10, 2024), <https://www.mellon.org/article/ten-unexpected-things-to-check-out-at-public-libraries> [<https://perma.cc/K98X-6YTL>] (listing items other than books carried by public libraries for the public).

383. AM. LIBR. ASS'N, *supra* note 83. The MUSTIE factors are misleading, ugly, superseded, trivial, irrelevant, or (obtained) elsewhere. *Id.*

384. See, e.g., *Little v. Llano Cnty.*, 138 F.4th 834, 886 (5th Cir.) (en banc) (Higginson, J., dissenting) (“The relevant question is a more sobering one, implicating the very text of the First Amendment’s protection against the abridgment of free speech: whether government officials may restrict—abridge—the spectrum of ideas available to the public by culling books

2. Protecting Library Patrons' Right to Receive Information

The majority in the Fifth Circuit rejected the *Little* plaintiffs' contention that the right to receive information applied in that case.³⁸⁵ However, if a public library is correctly classified as a limited public forum, then viewpoint-based book removals would violate library patrons' right to receive information.

Under this paradigm, book removals like those at issue in *Little* could be challenged by patrons if they suspect the books were removed based on the ideas contained within. The burden of proof would then rest on the library to demonstrate that there were benign reasons for the book removal. For example, in *Little*, the judges found evidence that ten of the books were removed due to improper viewpoint-based discrimination, but that the "Fart Dictionaries and Toot Along Stories" were removed for vulgarity rather than for viewpoint.³⁸⁶

This interpretation would align with the plurality in *Pico*.³⁸⁷ While the *Pico* decision was fractured, Justices Brennan, Marshall, Stevens, and Blackmun all believed that viewpoint-based removals violated the First Amendment, and Justice Rehnquist in his dissent "cheerfully concede[d]" this point as well.³⁸⁸ Justice Rehnquist felt "quite confident that that day will not arrive" when Justice Brennan's hypotheticals regarding libraries' removal of Republican or Black authors come true.³⁸⁹ However, as the facts in *Little* show, that day has indeed arrived.³⁹⁰ Classifying the public library as a limited public forum protects the rights of all citizens to receive information free from government interference.

CONCLUSION

By declining to take up *Little v. Llano County*, the Supreme Court passed on a chance to turn the ideal of the freedom to read into a true First Amendment right. Classifying the collection of public libraries as a limited public forum will do just that.

As this Note demonstrates, the status of libraries under the First Amendment remains unsettled.³⁹¹ The Fifth Circuit's disagreement with the

from public library shelves, simply because those officials find the books' ideas inappropriate, offensive, or otherwise undesirable."), *cert. denied*, 146 S. Ct. 886 (2025).

385. See *supra* notes 294–319 and accompanying text.

386. See *Little v. Llano Cnty.*, 103 F.4th 1140, 1158 (5th Cir. 2024) (Southwick, J., concurring in part and concurring in the judgment in part), *reh'g en banc granted, opinion vacated*, 106 F.4th 426 (5th Cir. 2024), and *rev'd and remanded*, 138 F.4th 834 (5th Cir. 2025) (*en banc*), *cert. denied*, 146 S. Ct. 886 (2025). Whether bans on vulgarity should be considered viewpoint discrimination is beyond the scope of this Note.

387. *Bd. of Educ. v. Pico*, 457 U.S. 853, 855–75 (1982) (plurality opinion).

388. *Id.* at 907 (Rehnquist, J., concurring); see *supra* notes 145–73 and accompanying text.

389. *Pico*, 457 U.S. at 908.

390. See *generally* Complaint, *supra* note 274 (accusing the Llano County Library board of targeted viewpoint-based book removals).

391. See *supra* Part II.

Eight Circuit is therefore likely to deepen without Supreme Court guidance. A definitive ruling would give librarians across the country guidance on the legal limitations on their ability to remove books. If public libraries are ruled to be limited public forums, the opposition to viewpoint discrimination represented in the Library Bill of Rights would carry constitutional weight. Standard CREW procedures would still be permissible, but viewpoint discrimination against books in the library catalog would be prohibited. Now, librarians in the Fifth Circuit have diminished legal protections when resisting politically motivated removals, and librarians in other circuits remain in a constitutional gray area.³⁹²

In a commencement speech at Dartmouth College, President Dwight D. Eisenhower told graduates not to “join the book burners,” instead urging them to “go in your library and read every book.”³⁹³ The right of those with whom one disagrees to have their ideas in “places where they are accessible to others” must be “unquestioned, or it isn’t America.”³⁹⁴ His message is not just morally powerful but legally coherent and aligned with the First Amendment principles underlying public forum doctrine. Under *Little*, libraries in the Fifth Circuit face an increased risk of viewpoint-driven removals that echo the dangers President Eisenhower warned against.³⁹⁵ However, courts in other circuits can decline to follow *Little v. Llano County* and reject the government speech approach in favor of protecting the freedom to read for all Americans.

392. See Mart, *supra* note 93, at 189 (“What *Pico* means for public libraries as providers of open access to information and for law libraries as providers of open access to legal information is still being decided.”).

393. President Dwight D. Eisenhower, Remarks at the Dartmouth College Commencement Exercises, Hanover, New Hampshire (June 14, 1953), <https://www.presidency.ucsb.edu/documents/remarks-the-dartmouth-college-commencement-exercises-hanover-new-hampshire> [https://perma.cc/R837-63KT].

394. *Id.*

395. *Little v. Llano Cnty.*, 138 F.4th 834, 855 n.2 (5th Cir.) (en banc), *cert. denied*, 146 S. Ct. 886 (2025); Eisenhower, *supra* note 393.